No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
PETITIONERS

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

AMICUS CURIAE STATEMENT OF INTEREST....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. FURTHER NOTES ON *ZUBIK*, RE PRECISION, CARE, AND BALANCE.....4

II. WOMEN'S STATUS IN SOCIETY, AND ACCESS TO CONTRACEPTION, HAS HUGELY IMPROVED IN RECENT DECADES, SO THAT HB2 IS MUCH HARDER TO CALL AN "UNDUE BURDEN".....8

III. CATHARINE MACKINNON'S OBSERVATIONS ON HOW INCREASED SEX EQUALITY AND AVAILABLITY OF CONTRACEPTION MAY INFLUENCE THE ABORTION DEBATE.....11

IV *CASEY*, CONTRACEPTION, AND CONSTITUTIONAL COVENANTS WITH CHILDREN: RESPONSIBLE REASONS TO SUPPORT RESPONDENTS.....14

V THE FETUS' POSSIBLE LIBERTY, PRIVACY, CONSENT, AUTONOMY,

DIGNITY, DISABILITY-CONSCIOUS, ANTI-TORTURE, ANTI-DISCRIMINATION, AND ANTI-SUBORDINATION RIGHTS OR DIMENSIONS.....17

VI. TODAY, A MULTIHOUR DRIVE, AND OTHER FACTORS, MAY NOT ALWAYS BE AN UNDUE BURDEN ON ABORTION-SEEKERS; NOR IS HB2 "IRRATIONAL".....26

VII. THE "DORMANT COMMERCE CLAUSE" AND TEXAS' REFUSAL TO PREVENT ITS WOMEN FROM INTERSTATE TRAVEL TO OTHER ABORTION CLINICS.....30

VIII. TECHNOLOGY AND A COMING END TO ABORTION? OR, WHY ABORTION RESTRICTIONS MAY BE LESS OUTDATED THAN ABORTION ITSELF.....33

IX. A POSSIBLE MIDDLE GROUND IN THIS CASE: RELAXATION, NOT ELIMINATION, OF SOME OF TEXAS' ABORTION STANDARDS.....35

X. THE IDEALS OF BALANCE OR RECIPROCITY, IN *ZUBIK*, THIS CASE, AND ELSEWHERE.....37

(ANTECONCLUSION).....39

CONCLUSION.....40

TABLE OF AUTHORITIES

CASES

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 4-5, 6

Hill v. Colorado, 530 U.S. 703 (2000).....37

McCullen v. Coakley, 134 S. Ct. 2518 (2014).....35, 36, 37

Obergefell v. Hodges, 135 S. Ct. 2584 (2015).....39

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).....*passim*

Planned Parenthood of Se. Pa. v. Casey, 744 F Supp. 1323 (E.D. Pa. 1990).....26-27

Roe v. Wade, 410 U.S. 113 (1973).....*passim*

Shelby County v. Holder, 133 S. Ct. 2612 (2013).....8, 14

United States v. Windsor, 133 S. Ct. 2675 (2013)...38

Ward v. Rock Against Racism, 491 U.S. 781 (1989).....5

Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015).....27

Zubik v. Burwell, 778 F.3d 422 (3d Cir. 2015), *cert.*

granted, 136 S. Ct. 444 (Nov. 6, 2015) (No. 14-1418).....*passim*

CONSTITUTION

U.S. Const. art. I, § 8, cl. 3 (Commerce Cl.).....32 & n.10

STATUTES

"HB2", cited to Resp'ts' Merits Br. in 15-274.....3

HB2 § 10(b).....35

Tex. Health & Safety Code § 171.0031(a) (1)...36

Patient Prot. and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).....10 & n.6, 13, 29

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq*.....5 & n.5, 6

RULE

S. Ct. R. 37.....1 n.1

OTHER AUTHORITIES

(All Internet links below were last visited February 3, 2016.)

Bookworm Room, 16-Week-Old Fetus Ultrasound Image, http://www.bookwormroom.com/wp-content/uploads/2015/09/16_week_ultrasound_3d.jpg.....25-26

David Bowie, *Blackstar* (ISO 2016).....20 & n.7

Lazarus (ISO 2015).....20 & n.8

Lazarus video *available at* DavidBowieVEVO, YouTube, Jan. 7, 2016, https://www.youtube.com/watch?v=y-JqH1M4Ya8.....20

Br. of *Amicus Curiae* David Boyle in Supp. of Pet'rs in *Zubik v. Burwell*, *supra*, *available at* http://www.scotusblog.com/wp-content/uploads/2016/01/David-Boyle-LSP-Amicus.pdf.....1, 4 & n.4, 6, 7, 10

Lauretta Brown, *Little Sister on Religious Freedom Lawsuit: We Have No Choice But to See it Through to End*, Jan. 25, 2016, 1:36 p.m., http://www.cnsnews.com/news/article/lauretta-brown/little-sister-poor-obama-asked-respect-all-faiths-it-was-my-prayer-it.....6-7

Brs. in 15-274:

Br. of Honorable Wendy Davis et al. as *Amici* [sic] *Curiae*.....22

Resp'ts' Merits Br.....3 n.3, 26, 36

U.S. Br.....32

Martin Buber, ideas of "I-Thou" and "I-It".....24

Golden Rule.....24

Lesley Gore, *You Don't Own Me* (Mercury 1963).....39 & n.12

Anders Hoveland, *racism, classism, sexism, and now... 'Bornism'*, PoliticalForum.com, Nov. 28, 2014, 8:43 p.m., http://www.politicalforum.com/abortion/385135-racism-classism-sexism-now-bornism.html.....20

Vickey Kall, *Mystery Mosaics in Long Beach*, History, Los Angeles County, Nov. 18, 2013, http://historylosangeles.blogspot.com/2013/11/mystery-mosaics-in-long-beach.html.....2

Heather Kelly, *No smartphone, no problem: Lyft gets into health care*, CNN Money, Jan. 12, 2016, 2:16 p.m., http://money.cnn.com/2016/01/12/technology/lyft-medical-rides-health-care/index.html.....28

1 *Kings* 3:16-28.....1-2

KPBS, *Autistic San Diego Lawyer Plans To Practice Special Education Law*, June 8, 2015, http://www.kpbs.org/news/2015/jun/08/new-san-diego-lawyer-has-autism-plans-practice-spe/.....22-23

George Lucas, *Star Wars* (1977-present).....22

John Lennon, *Imagine* (Apple 1971).....35 & n.11

LifeSiteNews, Aborted Fetus Photograph, https://lifesite-cache.s3.amazonaws.com/images/made/images/blog/D-and-E-abortion_645_430_55.jpg.....26

Catharine A. MacKinnon, *Abortion: On Public and Private, in* Toward a Feminist Theory of the State 184, 184 (1989) (quoting Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (1976)).....39

Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 Yale L.J. 1281 (1991).....11, 12, 13, 14, 15-16

N.Y. Rev. of Bks.....18

Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative and Institutional Considerations of States' Extraterritorial Powers*, 51 St. Louis U. L.J. 713 (2007).....31, 32

Sister Sledge, *We Are Family* (Cotillion 1979), *available at* Pierre Richard, YouTube, Mar. 25, 2010, https://www.youtube.com/watch?v=eBpYgpF1bqQ.....40 & n.13

SPECTRE (Eon Productions 2015).....21 & n.9

Dylan Thomas, *The Force That Through the Green Fuse Drives the Flower* (1933).....21

AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents. This case is being considered "in tandem with" *Zubik v. Burwell*[2] (to name one case), in that they are both in the same Term, and both deal with abortion and reproductive rights. So the cases should be considered for their synergistic relation to each other. E.g., given that contraception is often available for no cost these days, how does that affect the abortion debate?

Since Amicus filed a brief in *Zubik*, he is also filing one here, to point out the relation of this case to *Zubik*, and also to continue defending the value of human life, as he has done in other briefs.

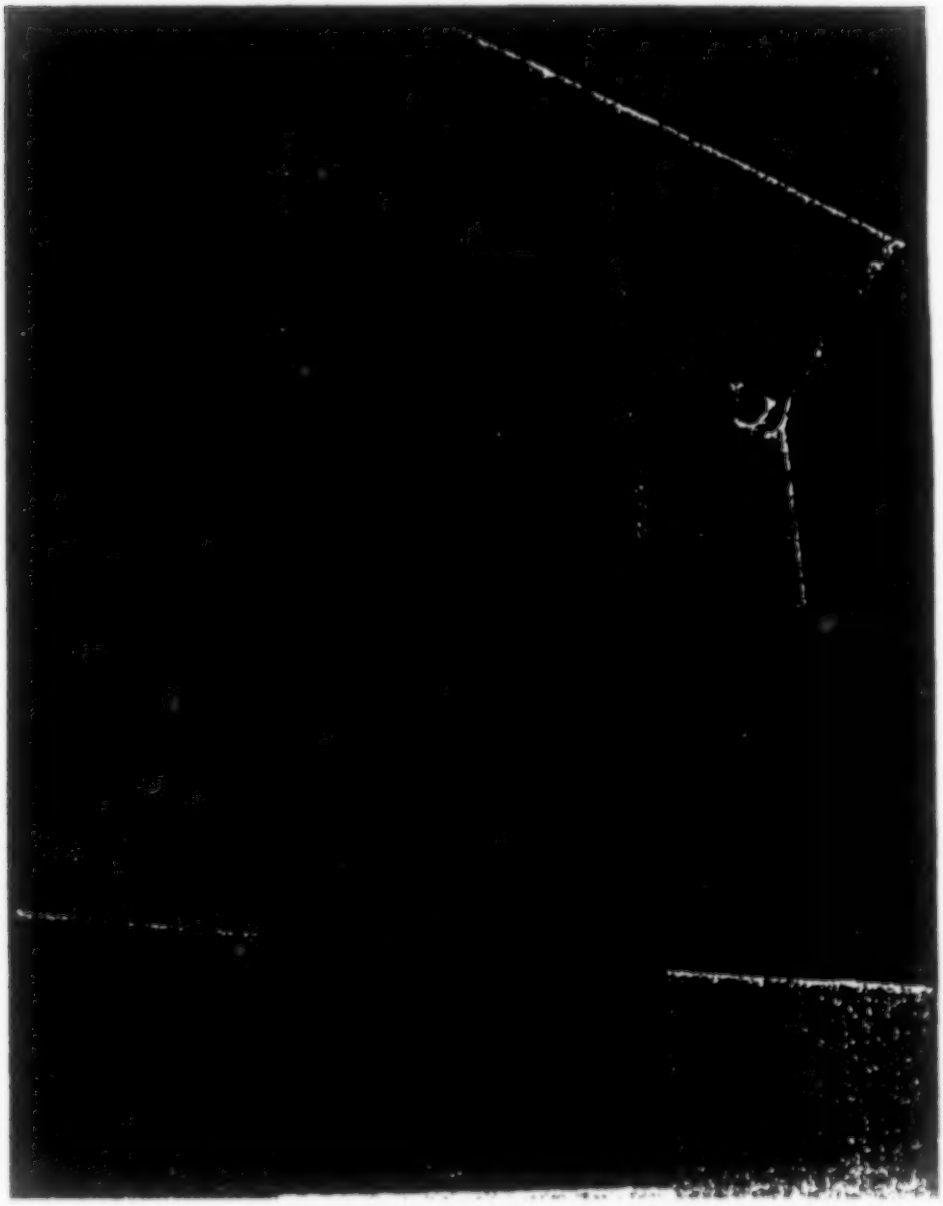
The Court may have to be relatively Solomonic both here and in *Zubik*, or the "mega-case" that they arguably form together, in having to balance reproductive rights, children's right to life, women's rights, religious rights, employer rights, employee rights, etc. Indeed, Amicus was pleased last Wednesday, January 27, to be walking in his city and to discover the following mosaic on a wall, depicting the well-known story from 1 *Kings* 3:16-28, about Solomon and the two women who each claimed

---

[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Both Petitioners and Respondents e-mailed Amicus permission to write briefs; copies of the letters are being sent to the Court with this brief.

[2] 778 F.3d 422 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 444 (Nov. 6, 2015) (No. 14-1418).

that a certain child was her own, and who each begged the king to decide in her favor, *see id.*:



(Courtesy of Vickey Kall, *Mystery Mosaics in Long Beach*, History, Los Angeles County, Nov. 18, 2013, http://historylosangeles.blogspot.com/2013/11/mystery-mosaics-in-long-beach.html.) Anyway, the mosaic and Bible story both remind us of judges'

importance in protecting innocent infant life—threatened by a sword, no less—, and also protecting women's rights, in a just fashion.

Of course, real justice may require precision and careful examination of the laws and facts at hand; whereupon, we start, following the Summary of Argument, with some further small discussion of *Zubik*.

SUMMARY OF ARGUMENT

Zubik offers lessons on balance, and on "strict scrutiny" of law and "the real world"

Considering the massive improvement in women's status and entitlements (like free contraceptives) in recent decades, Texas' abortion regulations ("HB2"[3]) may not cause an "undue burden" on abortion rights.

As Professor Catharine MacKinnon has noted, it may be fair to hold women more responsible as they receive more power and equality.

Under today's conditions, HB2 withstands the *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "undue burden" test.

The fetus should be considered to have dignity and, to an extent, liberty or other qualities commonly ascribed to fully-born people.

Due to changes in American women's condition and other conditions, a drive of several hours to an

---

[3] As cited in Resp'ts' Merits Br. at 1.

abortion clinic may not be an "undue burden" And HB2 has a rational basis.

Texas does not oppress Texan women who choose abortion clinics in other States; nor does the convenience of choosing those clinics in other States oppress Texan women.

One day, abortion may be obsolete, especially since medical technology may let the embryo may be viable at conception. Thus, preserving abortion restrictions is appropriate for the times.

If the Court decides to overturn some of HB2, this need not mean that all of it be overturned.

Reciprocity and responsibility are important for women, and for all of us.

The Court can find creative, fair ways to avoid the violence of abortion either to the unborn or their mothers.

ARGUMENT

I. FURTHER NOTES ON *ZUBIK*, RE PRECISION, CARE, AND BALANCE

Amicus' *Zubik* brief,[4] while supporting *Zubik* Petitioners, emphasized, *see id. passim*, the need for consideration of all parties in the case and their rights or needs. On that note, Amicus politely mentions that now that he has reexamined *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)

---

[4] *Available at* http://www.scotusblog.com/wp-content/uploads/2016/01/David-Boyle-LSP-Amicus.pdf.

("*Hobby Lobby*") more closely, the "strict scrutiny" issues are even more confusing than before. To wit, the *Hobby Lobby* Court—while not mentioning "strict scrutiny" at all, *see id.*—usually just mentions "least restrictive means", *see id. passim*, in reference to one prong of the Religious Freedom Restoration Act of 1993 ("RFRA")[5]; but just once mentions "the judicial scrutiny called for by RFRA, in which a court must consider the government's interest and how narrowly tailored the requirement is.", 134 S. Ct. at 2775 n.30 (Alito, J.). That is, the *Hobby Lobby* opinion at one point talks about "narrow[ ] tailor[ing]", *see id.* at 2775 n.30, instead of mentioning RFRA's "least restrictive means" as it had throughout the rest of the opinion, *see Hobby Lobby passim*.

The logical conclusion from those *Hobby Lobby* quotes or citations would then be that "narrow tailoring" is therefore identical to "least restrictive means" But *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), says that "we reaffirm today that a [pertinent] regulation must be narrowly tailored to serve the government's interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798 (Kennedy, J.). This completely disproves, *see id.*, that "narrow tailoring" is identical to "least restrictive means"

So, respectfully said, it seems that in *Hobby Lobby*, the Court may have made an error by equating "narrow tailoring" to "least restrictive means"; or if the Court somehow changed the

---

[5] Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.*

standard overnight so that "narrow tailoring" is now the exact same thing as "least restrictive means", it did not explain the reasoning of this to the public. (As Amicus explained in his *Zubik* brief, *see id.* at 8, "least restrictive means" does not automatically imply or include "narrow tailoring", especially since a lack of restrictive means may by its very nature produce an "underbroad" or underinclusive degree of coverage by a law, thus failing narrow tailoring.)

Besides alerting the Court to a possible error in *Hobby Lobby*—and the unfair advantage that an unwarranted assertion of a "narrow tailoring" requirement could give to those who claim that all three prongs of strict scrutiny are present in RFRA cases, rather than just the two prongs of "compelling interest" plus "least restrictive means"—, Amicus is making the broader point that careful scrutiny and consistency can be important, either in case language or in "real life"

For example, looking at a pregnant woman, one may see a belly bump, but not see the face of the child/fetus within. Many observers may conclude, "There's no child there, just a lump." More careful observers, though, may conclude, "There really is a child there, with possible rights and dignity, even though we cannot see the little girl's face right now behind the wall of the mother's belly."

Another lesson from *Zubik* is about balance, including both petitioners' and respondents' needs and rights. Amicus notes Lauretta Brown, *Little Sister on Religious Freedom Lawsuit: We Have No Choice But to See it Through to End*, Jan. 25, 2016, 1:36 p.m., http://www.cnsnews.com/news/article/

lauretta-brown/little-sister-poor-obama-asked-respect-all-faiths-it-was-my-prayer-it,

> As for the Sisters' lawsuit against the Obamacare mandate, Sister [Constance] Veit described it as "a matter of religious liberty,"
>
> "The reason we've taken it so far is that the fines being imposed on us would represent $70 million dollars across our homes in the United States, so that's an impossible amount for us," she explained. "If it was some small amount maybe we would say okay, we'll pay the fine and stick to our beliefs. But that kind of money is just impossible. So we really have no choice but to see it through to the end."

Id. Thus, *see id.*, it is admitted that some small fine may not be outrageous enough for *Zubik* petitioners to contest. Amicus will not contradict the wisdom of the holy Sister on this point. (Especially so, since his *Zubik* brief, *see id. passim*, was largely about the possibility of a relatively-small fine (or alternative financial arrangement such as paying female employees more) for Petitioners there being preferable for them to a large loss, i.e., losing the case entirely.) Balance is important.

In the instant case, balance is also important, though here it may not be about "fair wages for women" issues, but largely about viewing the context of the case, and seeing whether the balance or

imbalance of various factors has changed. Perhaps the largest relevant change of balance has been the change in women's status over the past few decades.

II. WOMEN'S STATUS IN SOCIETY, AND ACCESS TO CONTRACEPTION, HAS HUGELY IMPROVED IN RECENT DECADES, SO THAT HB2 IS MUCH HARDER TO CALL AN "UNDUE BURDEN"

In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Court observes of Southern, and national, social circumstances surrounding some voting issues, "Nearly 50 years later, things have changed dramatically. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.* at 2625, 2631 (Roberts, C.J.); "Today, our Nation has changed. [T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions. [V]oter turnout and registration rates now approach parity. And minority candidates hold office at unprecedented levels." *Id.* at 2632 (quotation marks and citations omitted) (Thomas, J., concurring).

On a similar note, American women, and men, all of us together, do not live in the same America as the 1992 America of *Casey, supra* at 3. Women not only can fly fighter planes now, as they were able to do from the Clinton Administration (1993) on: they can now serve in any combat position in the military. Women can even marry other women now, in every State in the Union. (A status that can help avoid

pregnancy, re the contraceptive issues *infra*.) Multiple women have run for President or Vice President since 1992. Women may now outnumber men in colleges, to the point that colleges may give surreptitious "affirmative action" to males to admit more of them to their student bodies. Etc.

By contrast, back in the early 1970's, around the time of *Roe v. Wade*, (410 U.S. 113 (1973)), things were often horrible for American women. Marital rape was still legal in many places. Newspapers often had "help wanted" sections "For Men Only" or "For Women Only" Etc. So while Amicus does not endorse abortion, he sees that under those sorts of demeaning or oppressive circumstances for women 40-some years ago, relatively unrestricted abortion may have made sense to some people.

By 1992, though, legalized marital rape and job ads "For Men" or "For Women" may have been largely out the door; and somewhat appropriately, perhaps, 1992's *Casey* decision made it easier to restrict abortion, with an "undue burden" standard instead of *Roe*'s strict-scrutiny standard. As women gained more power, they were held to a higher standard of responsibility *vis-à-vis* abortion, so to speak. (Amicus is not saying that the change in women's status was the *Casey* Court's rationale for changing the standard for review of abortion laws; he is merely noting the appropriateness of the shift in standard, given women's gain in status and power by 1992.)

And again, in 2016, women have advanced in a way that may have been unimaginable a few decades

ago. The Democratic frontrunner in the 2016 presidential race is (or was long) Hillary Clinton, not a man. Moreover, there are three female Members of this learned Court—and probably many more to follow. While American women still may face discrimination and difficulties: on the whole, things are often much better for them than in 1973 or 1992.

One way in which women have more rights or entitlements than before is the massive amount of federally-mandated contraception, free with no co-pay, under the Patient Protection and Affordable Care Act[6] ("PPACA"). Amicus is not endorsing artificial contraception, but some of his own efforts in his *Zubik* brief, *see id.*, may let women get at least the money to pay for their own contraception, if the *Zubik* petitioners refuse to provide that contraception themselves. (If the women employees spend the money not on artificial contraception but on "natural contraception", e.g., calendaring software for the "rhythm method", or chastity or abstinence classes, Amicus will not complain; nor will he complain if the money is spent on things other than contraception.)

Given this recent Niagara of federally-supported contraception, and the various advances in women's power mentioned *supra*, could a feminist credibly believe that such things should be taken into consideration re abortion rights?

---

[6] Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).

III. CATHARINE MACKINNON'S OBSERVATIONS ON HOW INCREASED SEX EQUALITY AND AVAILABLITY OF CONTRACEPTION MAY INFLUENCE THE ABORTION DEBATE

Maybe the world's best-known feminist legal academic, Professor Catharine A. MacKinnon, wrote a 1991 article, *Reflections on Sex Equality under Law* (100 Yale L.J. 1281), that may make readers think twice, if they had had a preconception that feminism automatically equals abortion on demand under all circumstances.

MacKinnon supports abortion rights: "Because forced maternity is a sex equality deprivation, legal abortion is a sex equality right." *Id.* at 1323.

(Amicus is not agreeing that forced maternity is necessarily a sex equality deprivation, especially if someone were aborting her own daughter because the daughter is an undesired female. That abortion would itself be a particularly violent sex equality deprivation. Amicus might not also agree with others on what constitutes "forced maternity"; is a partial-birth abortion where at the last minute, with all the baby hanging out of Mom except for the head, Mom suddenly decides she wants an abortion, "forced maternity"? Or does the fetus/baby have a reliance interest in living, having survived for nine months already? "Forced maternity" may be bad, but "forced death" of a fetus may not be too good either.)

MacKinnon gives some ways that sex equality could be promoted, and mentions that increasing equality could impact the abortion debate:

> Sex equality would be advanced if women were permitted to control sexual access to their bodies long before an unwanted pregnancy. Sex equality would be advanced if society were organized so that both sexes participated equally in daily child care[, and] advanced by economic parity between women and men. Equality for women would gain from racial equality. All these changes would overwhelmingly reduce the numbers of abortions sought. The abortion controversy would not be entirely eliminated, but its ground would shift dramatically.
>
> Those who think that fetuses should not have to pay with their lives for their mothers' inequality might direct themselves to changing the conditions of sex inequality that make abortions necessary. They might find the problem largely withered away if they, too, opposed sex on demand.

Id. at 1323-24. As Amicus has noted *supra* at 9, marital rape is now illegal all over America, so that "sex on demand", *id.*, is more of a rarity. And MacKinnon accurately notes, *see id.*, that those who oppose the killing that is part of every abortion, may want to do something to promote sex equality. Wise words indeed.

Even if MacKinnon had not published her ideas *supra*, it is common sense that as gender equality advances, there may be a different debate about abortion.

She then mentions a factor relevant to America's present-day "reproductive freedom" situation:

> If sex equality existed, there would be no more forced sex; safe effective contraception would be available The point is, the politics of abortion would be so dramatically reframed, and the numbers so drastically reduced, as to make the problem virtually unrecognizable. If authority were already just and body already autonomous, having an abortion would lose any dimension of resistance to unjust authority or reclamation of bodily autonomy. Under conditions of sex equality, I would personally be more interested in taking the man's view into account.

Id. at 1326-27 (citation omitted). MacKinnon mentions that "safe effective contraception would be available", *id.* Well, thanks to the PPACA, it is not only available, it is free of charge. We are not in Utopia yet, but the oceans of no-co-pay contraceptives available to women have made sex equality much stronger these days, at least by MacKinnon's standards. And she says that under changed conditions re contraceptives etc., she thinks that restrictions, or at least the male gender's views,

about abortion, could be "tak[en] into account", *id.* That being said, maybe what constitutes an "undue burden" for abortion laws may not be the same as it was in 1992 or 1973.

If we do not believe this, if we do not cede that the improvements in women's rights and entitlements after 1973 could make some difference in the abortion debate, then what happens to the logic of *Shelby County*, *supra* at 8? The *Shelby* Court believed that changing conditions re race were profoundly meaningful, and that "[when o]ur country has changed, legislation remedy[ing] problem[s must] speak to current conditions." *Id.* at 2631 (Roberts, C.J.). HB2, even if it *arguendo* might have been inappropriate in 1973 (?), is much harder to criticize now, when contraception is free, and women are free to join the Navy SEALs or join with other women in legal matrimony.

If the Court somehow wants to overturn its own *Shelby* decision, that would be interesting. If it does not overturn it, then *Shelby*, and its doctrine of "social change is something that matters", gives some valuable clues as to how to decide the instant case.

IV *CASEY*, CONTRACEPTION, AND CONSTITUTIONAL COVENANTS WITH CHILDREN: RESPONSIBLE REASONS TO SUPPORT RESPONDENTS

Re the topic of contraception, *Casey* deals with that, or the topic of women's responsibility, at various points. First off, *Casey* mentions "personal decisions concerning not only the meaning of

procreation but also human responsibility and respect for it." 505 U.S. at 853 (Kennedy, O'Connor, and Souter, JJ.). Thus, "responsibility", *id.*, including women's, is an issue.

Casey also mentions the problems "present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant", *id.*, and

> the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.

Id. at 856. The two previous *Casey* quotes might *prima facie* lend ammunition to those who believe that availability of contraception should have no effect whatsoever on the abortion debate. However, those quotes need not lead to such a conclusion. For one, the latter quote says, "for two decades of economic and social developments, people have made choices in reliance", *id.*; but when conditions change, such as the status of women in the society in the two decades and four years since 1992, then the Court may have to "rely" on the new conditions, not the old ones.

Moreover, Amicus is not suggesting that the increased availability of contraception be used to overturn either *Roe* or *Casey*, as some might suggest. Indeed, a literal reading of MacKinnon, *Reflections*,

supra at 11, "safe effective contraception would be available the politics of abortion would be so dramatically reframed", might lead some to throw out "undue burden" and use "rational basis" instead to deal with abortion laws, since it is so easy to access contraceptives nowadays. But all Amicus is doing is saying that what an undue burden is, may be different from what it used to be decades ago.

An illustration: if there were a massive lack of birth control, say, if President Truzorina outlawed all contraception next year (!!!), many "pro-choice" groups might scream that there should be an abortion clinic on every other street corner, or alternatively, that there should be at least as many clinics as there are Starbucks franchises. So if we assume that a dearth of contraception would move activists to get rid of restrictions on abortion, then why can it not be the other way around, e.g., that the present massive supply of contraception might allow reconsideration of what "undue burden" presently is?

—Speaking bluntly: when you copulate, you know that you risk making a baby, despite any contraceptive precautions. So, to what extent is it right that the unborn infant suffer death from abortion, just because of a "bad roll of the dice" whereby contraception, commonly-available contraception, did not happen to work—or the parents were neglectful and irresponsible about using contraception, even though it is widely available for free now? Is that abortion fair to the unborn child??

On that note, when the *Casey* Court says, "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession", *id.* at 901, there is an ironic rhetorical problems there. I.e., it is abortion that *prevents* those "future generations", *id.*, from existing, at least in part. (Roughly fifty-some million abortions have occurred in America since *Roe*, it is estimated. America is poorer for population because of all those deaths, and because of the absence of the many children who were never born of the unborn children who were aborted.)

And while the *Casey* Court notes with some truth that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives", *id.* at 856 (citation omitted), one set of women who have not been helped is the "women in the womb", all the little preborn girls who were aborted. (And sex-selective abortion is a sexist monstrosity, one may say, evil just like race-selective abortion, and even gay-selective abortion. Amicus would be pleased to outlaw abortion that selects by gender, race, or expected sexual orientation: such bigoted abortions resemble Nazism.)

All that said, it is time to address some more philosophical concerns, not just narrowly legal ones:

V THE FETUS' POSSIBLE LIBERTY, PRIVACY, CONSENT, AUTONOMY, DIGNITY, DISABILITY-CONSCIOUS, ANTI-TORTURE, ANTI-DISCRIMINATION, AND ANTI-SUBORDINATION RIGHTS OR DIMENSIONS

This Court has not recognized fetal personhood, and Amicus is not expecting it to any time soon. (The Court has not recently accepted appeals of cases which overturned direct limits on abortion, e.g., no abortions after fetal heartbeat is detectable.) However, one can, and should, still ask whether the fetus or embryo has characteristics which approach personhood, and how that might affect the debate.

For example: what fetus has ever consented to an abortion? Not only does the fetus have the father's DNA as well as the mother's (fathers may be a great forgotten dimension of the abortion debate), but the fetus may have value and dignity in itself. Does the fetus have a small smartphone, say, by which it can publicly telegraph its willingness to be killed? The fetus' consent, "constructive" or otherwise, should not be assumed from its forced silence in the womb. (Can one be "pro-choice" about giving the fetus a choice to live?)

Some readers may be aghast at the very notion of fetal consent. Can the fetus read, write, and think? they may ask. Does the fetus discourse on Proust, or take the New York Review of Books? But such cognitive abilities need not be requisite to assuming that an entity does not want to be killed.

—Let us imagine some pathetic, comatose drunk lying in a snowbank in the middle of a road. He is so "plastered" that the idea of his consenting to anything is ridiculous, at least for a number of hours (maybe days). If he can't consent, then what is wrong, a "consent" purist might say, with letting the drunk freeze to death, or with letting him be run over by a car? The drunk's constructive consent to

life and to rescue efforts is presumed, though, e.g., that he wouldn't really cotton to be reduced to a human pancake, being pressed to death by an 18-wheeler truck.

Why could the same consideration not extend to the fetus? (In fact, the drunk may have very little time left to live anyway, due to age, liver cancer, or other factors; whereas a particular fetus could live over 100 years and leave dozens of offspring, if she were only allowed to leave the womb alive.)

To mention fetal consent is not to put the fetus above the mother: we can and should respect both. But since we were all fetuses once, everyone reading this brief and everyone on Earth, we should be wary of assuming that the fetus' lack of consent to being killed, is nothing to break a sweat about.

And "killed" is the right term. The Orwellian evasiveness of "terminating a pregnancy" should have ended long ago: the usual way to terminate a pregnancy is to have the baby, alive. A more accurate term would be "killing a potential child" (Technically, many abortions may be removing the fetus/embryo from the womb, instead of killing it *per se*; but the assumedly low instance of putting the fetus/embryo on the best life support available outside the womb, instead of putting it into the dumpster or incinerator, makes "killing" rather than mere "removing" a more appropriate verb.)

...Amicus' near-namesake, the late musician and artist David Bowie (RIP), has gotten much attention lately, not least for the extraordinary way in which he was able to "frame" and discuss his own death,

through his release of the #1-selling *Blackstar*[7] album whose songs seem highly influenced, *see id.*, by his fatal cancer. The video of one song, *Lazarus*,[8] shows him getting out of a wooden cabinet (which could represent the womb?) and going through various artistic poses and gyrations—likely representing his life as an artist—before getting back into the cabinet, which seems at that point to be a symbolic coffin, *see id.* (Video *available at* DavidBowieVEVO, YouTube, Jan. 7, 2016, https://www.youtube.com/watch?v=y-JqH1M4Ya8; due to some mildly crude language or frightening imagery, caution is advised.) But do abortees (aborted fetuses) have such dignified choices, re their deaths, as did Bowie?

No, they do not tend to. They do not consent to death, their voices are not heard, and their deaths are rarely celebrated or publically discussed as with Mr. Bowie's in *Blackstar*: they often end up in pieces, bloodied pieces, in a dumpster or incinerator.

On that note, somebody should probably start a blog called "Fetal Libertarian", supporting the idea that the unborn child could have liberty, autonomy, privacy, dignity. There is even a term now, "bornism", for the prejudice often wielded against a child simply because she has not been born yet. *See* Anders Hoveland, *racism, classism, sexism, and now... 'Bornism'*, PoliticalForum.com, Nov. 28, 2014, 8:43 p.m., http://www.politicalforum.com/abortion/385135-racism-classism-sexism-now-bornism.html.

---

[7] (ISO 2016).

[8] (ISO 2015).

We do ill to assume that the privatized death penalty for the fetus that has existed since *Roe*, is always responsibly used, either. As noted *supra*, some abortions are explicitly to get rid of a certain gender, race, or possibly homosexual orientation. Even some pro-choice people express a horror of "abortion as birth control"

"A license to kill also means a license not to kill", observes Ralph Fiennes' "M" in the current James Bond film *SPECTRE*,[9] *id.* Indeed, the idea of a license to kill, *à la* 007, is not a conventional way of imagining abortion rights, but it is an accurate one. At the end of the film, Daniel Craig's Bond does not bother to shoot SPECTRE's depraved head, Ernst Stavro Blofeld (Christoph Waltz), in the head, but takes the bullets out of his own gun, throws it away, and walks off, valuing life over death, *id.* By contrast, many couples, or women, casually choose abortion without a reason of self-defense (fetus threatening mother's life, or causing serious injury potential) or rape (nonconsenting sex), and thus do not choose to spare from death their own pre-born infant: an innocent being who has done none of the terrible things that Blofeld did, either.

So while there is a legal right to abortion, it should be used carefully, whether people want to hear that or not. Dylan Thomas spoke of life as "the force that through the green fuse drives the flower", in the poem of the same name (1933), *id.* And as that force awakens in each embryo or fetus, Amicus believes parents should be hesitant to send that youngling to the dark side of existence, the land of

---

[9] (Eon Productions 2015).

Death. *Inter alia*, what genius or hero might be snuffed out thereby?

Indeed, what if the Virgin Mary had aborted Jesus? Where would Christianity be now? And on a somewhat lower level, what if the *Star Wars* mythos' Padmé Amidala had aborted Luke and Leia Skywalker? Where would the galactic rebellion have gone?

Some women have written the Court to tell how their abortions improved their (the women's) lives. Amicus thinks it is good to hear the free speech of these women, their stories about the extra opportunities they garner from being able to eliminate their potential offspring. But what about those offspring's opportunities? How can you live, love, or run for President if you have been aborted? Who speaks for them?

Texas senator Wendy Davis relates a painful choice to abort a fetus with a brain abnormality, and also tells of the shameful, inappropriate taunts such as "Abortion Barbie" thrown at her, *see* Br. of Honorable Wendy Davis et al. as *Amici* [sic] *Curiae* at 14, 16. While she has been unduly disrespected, still, one may question aspects of some stories like hers, while still showing respect and compassion to her. (As one may also show Kim Davis respect and compassion, and listen to her story.)

For example, one should not assume that because a fetus seems "damaged", that that provides moral or legal *carte blanche* to abort it. *See, e.g.*, KPBS, *Autistic San Diego Lawyer Plans To Practice Special Education Law*, June 8, 2015, http://www.kpbs.org/

news/2015/jun/08/new-san-diego-lawyer-has-autism-plans-practice-spe/,

> [Erik Weber's taking the lawyer's oath of professional conduct] was something his mother, Sandy Weber, said at one time seemed impossible because her son has autism.
>
> "This child who was never supposed to be any more than 18 months old cognitively, and who I was told at 5 should be put in a home, here he is," Weber said.
>
> As a child he wasn't able to speak, stand up or raise his hand, and now he's taken the oath to become a lawyer, she said.

Id. Weber might even be a Member of this honorable Court one day, for all we know; but if he had been aborted due to "disability", he would not be a lawyer today.

Of the young ones still in the womb, one can imagine a letter from a future lawyer,

> Dear Court,
>
> How are you? I would like to be in the legal profession one day when I am born. I am a three-month old fetus. I have some physical and mental disabilities, but hope to be like Stephen Hawking, or the many lawyers who have succeeded despite either congenital mental or emotional issues,

> or disabling factors that developed later such as depression, substance abuse, or other mentally-related issues. I hope you give little future lawyers like me consideration and value our lives, since many of them, like me, hope to be like you one day. Thanks for your time,
>
> Sincerely,
> Fannie Fetus

A letter from a fetus may seem maudlin or unrealistic, but if you can hear from lawyer Wendy Davis, wh*y* can you not hear what a lawyer-in-the-womb might think?

Indeed, as per the Golden Rule, or Martin Buber's idea of "I-Thou" (treating others as equals) rather than "I-It" (treating others as things), any judge might want to put herself or himself in the place of a fetus about to be aborted.

Members of the Court seem little amused by protesters about campaign finance or gay marriage disrupting Court proceedings. But what if someone got past the guards and tried to *abort* the Justices, say, with a giant-sized scalpel or curette, or a huge vacuum? That would cause trenchant discomfiture, would it not?

That "*Grand Guignol*" or Salvador Dalí-esque scenario (not to mention Bosch or Brueghel) is meant to remind readers that we were all fetuses once, and that any time we countenance abortion, we should think about what that means to the abortee. "There but for the grace of God, go I."

And when the *Casey* Court says of the pregnant woman, "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture", *id.* at 852: "possibly so", but what about the *fetus'* suffering? if it is old enough to feel pain? or the "suffering-in-the-broad-sense" constituted by its being deprived of life and opportunity??

The fetus' rights or imaginable rights against pain, torture, discrimination on the basis of disability or otherwise, subordination, and rights toward liberty, privacy, consent, autonomy, and dignity, should be considered seriously. Amicus believes we should avoid cruelty to those little "immigrants" who want to peacefully cross the border from the womb to life out here with the rest of us. (Warning: potentially-disturbing images ahead) To turn someone like this peaceful *in utero* resting child viewed by ultrasound,

http://www.bookwormroom.com/wp-content/uploads/2015/09/16_week_ultrasound_3d.jpg (courtesy of Bookworm Room), into something like this,

https://lifesite-cache.s3.amazonaws.com/images/made/images/blog/D-and-E-abortion_645_430_55.jpg (courtesy of LifeSiteNews), should give us all pause, whether it is "legal" or not.

VI. TODAY, A MULTIHOUR DRIVE, AND OTHER FACTORS, MAY NOT ALWAYS BE AN UNDUE BURDEN ON ABORTION-SEEKERS; NOR IS HB2 "IRRATIONAL"

Speaking of "giving us pause", a key issue in this case is the distance a woman seeking abortion may need to drive in order to get to a clinic, and the pause, the time expenditure, from the drive. The *Casey* district court found that some women had to drive more than three hours to get to a clinic, *see* Resp'ts' Merits Br. at 22, citing 744 F. Supp. 1323,

1352 (E.D. Pa. 1990). Yet this Supreme Court in *Casey* found that even "women who have the fewest financial resources, those who must travel long distances", *id.* at 886, were not unduly burdened by the 24-hour waiting period in question, *see id.* It seems that in 1992, a three-hour drive was not considered an undue burden. Why should it be one now?

In fact, considering the factors Amicus mentioned at length *supra* on the huge improvement in women's rights or entitlements since 1992, it would seem appropriate to extend that three-hour time, whether to four hours, five hours, or what-have-you. While abortion is a medical procedure, it is not just any medical procedure, but one whose purpose is to end a non-consenting potential (or real) human life. Five hours of driving, or even longer, should not *ipso facto* be considered an undue burden, especially seeing that every abortion may be an undue, unconsented-to, burden on the fetus herself.

So if, say, the improvement in woman's estate since 1992 lets us add even one mere hour to the three-hour driving time adduced *supra*, that is four hours total. Given a rough driving speed of a mile a minute, 60 miles per hour, that is a 240-mile drive. This means that even the 235-mile drive the Fifth Circuit mentions re the McAllen facility, 790 F.3d 563, 594 (2015), would not be too arduous; and drives of 150 miles or less would be *a fortiori* much easier, much less hard to call unduly burdensome and difficult.

As well, driving itself may be much less arduous than it used to be. Widespread use of GPS and the Internet make navigation, and avoidance of traffic jams, much easier than in 1992. Gas prices have been plummeting recently, and cars' fuel efficiency has improved greatly. Too, car safety has improved (wider use of safety air bags and of rear-view cameras to help avoid collisions, etc.); and car-sharing services like "Uber" or "Lyft" make it easier to get a lift to where you want to go. *See, e.g.*, Heather Kelly, *No smartphone, no problem: Lyft gets into health care*, CNN Money, Jan. 12, 2016, 2:16 p.m., http://money.cnn.com/2016/01/12/technology/lyft-medical-rides-health-care/index.html.

Another way to think of a multi-hour drive to an abortion clinic, is as a 24-hour waiting period by other means, but with a shorter wait time, say 8 hours total if there were a 4-hour drive each way, and with a little money spent, for gasoline or restaurants on the way.

Of course, a long drive may be more difficult for working women, who may need to take time from their jobs, etc. But the *Casey* Court already noted that "the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles", 505 U.S. at 886. And again, considering what is at the end of the drive to a clinic, i.e., the end of a preborn infant's life, a long, reflective drive before getting to that clinic, is not too much to ask for.

Indeed, *any* abortion regulation may burden *someone*, whether the abortion provider or an

abortion-seeker. Nothing short of abortion on demand, paid for by the public, might satisfy some "pro-choice" advocates—and even with free abortion on demand, someone or other might have trouble making it to a clinic. So advocates might then demand not only free abortion on demand (including re-legalized partial-birth abortion, so as to avoid any restrictions whatsoever on women's abortion choices), but also free public transportation, 24 hours a day, to the clinic for anyone who wants an abortion. All that, along with the free contraception that the PPACA already provides. But under *Casey*, Amicus does not believe that an endless array of freedoms and entitlements must be given to abortion providers or seekers.

All in all, the Court should consider that even the 235-mile drive to the McAllen facility might not be an undue burden, and should consider reversing the Fifth Circuit on its as-applied relief for that facility.

As for the issue of "rational basis" re the Texas abortion regulations at hand: a rational-basis test cannot "morph" into a stricter-scrutiny test out of nowhere; that would be oxymoronic. Amicus is not a physician, much less an abortion provider (!) or expert, so is not going to assert that any particular one of Texas' abortion restrictions is necessary. However, offhand, they seem at least rational. If a woman has a medical emergency or unexpected complication at an abortion facility, how would it hurt to have a doctor with admitting privileges at a local hospital, for example?

Some members of the medical profession may claim there is no rational basis for the regulations. But phenomena like political considerations (e.g., the present favorability towards abortion among many professional or "elite" populations) and "professional pride", including a desire to avoid being told what to do, sometimes occur, sadly. And common sense tells us that abortion is not always a walk in the park, medically speaking. If even inserting a tampon can kill you, as has often happened through "toxic shock", then how is it irrational to think that an abortion, even one by pill instead of surgery, may "muck up your insides" enough so that you could really use a well-appointed clinic and good doctor?

If Texas were really surreptitiously trying to overturn *Roe*, their allowing clinics in Texas' most populous areas, under the current regulations, is a funny way to do it. If the State demanded that abortion clinics be sheathed in gold leaf and offer diamond-encrusted drinking straws, that would be a somewhat obvious "TRAP", a trick to repress and bankrupt abortion providers. But the current regulations, even if thought somewhat unwise or excessive in their efforts to provide women superior medical care, do not thereby rise to the level of unconstitutionality under "rational basis"

VII. THE "DORMANT COMMERCE CLAUSE" AND TEXAS' REFUSAL TO PREVENT ITS WOMEN FROM INTERSTATE TRAVEL TO OTHER ABORTION CLINICS

And if Texas really wanted to oppress women seeking abortion, it could simply try to restrict or

harass their getting abortions outside of that State. *See, e.g.*, Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative and Institutional Considerations of States' Extraterritorial Powers*, 51 St. Louis U. L.J. 713 (2007), noting not only that

> Were *Roe v. Wade* to be overruled, Utah would have the power under contemporary constitutional jurisprudence to prohibit its citizen Mary from obtaining an abortion in California. This assessment is not disturbed by observations in recent Dormant Commerce Clause case law[.]

id. at 758, but also that

> if the citizen of a state that prohibits the activity in question can simply travel to a state that does not proscribe the activity and do there what her home state proscribes[, t]hat might be called "travel-evasion" from the perspective of her home state.
>
> Indeed, even if *Roe v. Wade* remains good law, the issue of travel-evasion arises in relation to abortion-related laws[.]

Id. at 745-46 (citations omitted). But Texas does not seem to have a problem with its citizens getting abortions in New Mexico, or, presumably, Oklahoma or elsewhere. (Incidentally, Respondents somehow have not mentioned the apparent existence of clinics around Albuquerque and Oklahoma City, and maybe

other parts of New Mexico and Oklahoma, that are closer and presumably more convenient to parts of northern Texas than some of the south Texas cities with abortion clinics are.)

The "Dormant Commerce Clause" doctrine, deduced from the Commerce Clause,[10] protects interstate commerce and travel. Texas respects this *vis-à-vis* abortion.

While the Dormant Commerce Clause usually prevents outright or overweening restriction of interstate commerce, the flipside is that it may allow some fair regulation, *cf.* Rosen Article *supra*, so as to prevent a "lowest common denominator" effect whereby no State could regulate anything for fear of a Dormant Commerce Clause violation.

Sometimes businesspeople try to erect *per se* barriers against commerce from other States; here, things are a little more subtle, and Petitioners may be seeking deregulation, deregulation that could hurt women's health, to help their own businesses, when in fact other States' clinics may be able to handle the commercial traffic caused by Texas women seeking abortion.

The Government claims, "A State would have greater freedom than its neighbor to enact abortion restrictions merely by virtue of having moved sooner to put them into place." U.S. Br. at 33. But this paraded horrible could apply to anything. One could then argue, unconvincingly, that all States must now allow assisted suicide, because it would be putatively "unfair" for most States to "preemptively" restrict

---

[10] U.S. Const. art. I, § 8, cl. 3.

that practice and claim that their citizens desiring assisted suicide would have to go visit Oregon, California, or some other State allowing assisted suicide.

And even if, say, a very small state like Rhode Island enacted relatively restrictive abortion laws, the reality of out-of-state clinics being available close by, given the little time it takes to drive from inside Rhode Island's borders to outside, would tend to prevent those laws from being unduly burdensome. Indeed, since some States' counties are larger than the whole State of Rhode Island, is it constitutionally mandated that every county have an abortion clinic, lest a resident have to be "unduly burdened" by travel to another county?

And if, say, State A has few clinics and State A's inhabitants travel over the border to clinics in State B, closure of particular clinics in State B may allow State A inhabitants to wield as-applied challenges to State A's abortion statutes. This is preferable to a facial overruling of State A's abortion statutes.

VIII. TECHNOLOGY AND A COMING END TO ABORTION? OR, WHY ABORTION RESTRICTIONS MAY BE LESS OUTDATED THAN ABORTION ITSELF

Another border, besides State borders, relevant to abortion these days is the border of fetal viability, and how this may help achieve a zero-abortion society: an ideal which should be a goal of decent people, one is tempted to say.

That is, what happens when medical technology has improved to the point that the fetus (embryo,

blastocyst, zygote, etc.) is viable at conception? That is, the fetus or similar entity could be transferred from a uterus, or even before implantation in the uterine lining, to an advanced-technology incubator which would let the embryo grow and survive for 9 months as healthily, more or less, as it would have in the womb. This may seem like a pipe dream now, but space travel, the Internet, and "Court TV" might have seemed like pipe dreams back in the 19th Century.

So if the fetus/embryo is viable at conception, then virtually all abortion could be outlawed, under current American law. If we are interested in the human future, that factor is something to think about. At that point, there would essentially be a "rational basis" test for abortion restrictions.

Thus, if the Court currently upholds restrictions on abortion, or regulations of abortion facilities, maybe the Court is not being a bunch of regressive Neanderthals who disrespect women; on the contrary, maybe greater abortion restrictions, or regulations with restrictive effect, are the wave of the future, and the Court is in touch with the times.

Ideally, as abortion may be phased out legally (e.g., the outlawing of abortion after viability, with an embryo viable at conception) and socially (e.g., seen as egregious and noxious, abuse of the fetus), and there is more equality available for men and women, whether in wages, or military-draft status, or Supreme Court membership (alternating five-man, four-woman Court with five-woman, four-man Court over the years, say), everyone may benefit in

that time of equality. Equality of man and woman, and of born and unborn people.

(One could tweak John Lennon's song, *Imagine*,[11] to say, "Imagine no abortion You may say I'm a dreamer/But I'm not the only one", *id.*)

But that is an ideal. A bright future without any abortion, is probably too much to hope for, but even significant steps in that direction would be helpful. Amicus hopes that medical research into lowering the age of fetal viability continues fruitfully, and that the Court takes into account the eventual possible end of abortion *in toto*.

IX. A POSSIBLE MIDDLE GROUND IN THIS CASE: RELAXATION, NOT ELIMINATION, OF SOME OF TEXAS' ABORTION STANDARDS

Even if the Court does not uphold Texas' regulations, or the Fifth Circuit, *in toto*, the Court should still try to uphold as much as possible. After all, HB2 has, admirably, the mother of all severability provisions, so that the whole law need not be aborted (so to speak) even if one part of it is defective. *See* HB2 § 10(b), allowing severability down to the level of each individual word; this may let Texas have the last word in this case. (HB2 § 10(b) forgot to mention "punctuation", e.g., letting commas or other marks be severed; but it is still a very strong severability provision.)

One role model may be *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), a free-speech case where the

---

[11] (Apple 1971).

Court overruled Massachusetts' replacement of a 6-foot no-approach-to-another-person zone (within an 18-foot area around an abortion clinic) by a 35-foot zone of total exclusion of many individuals, *see id.* at 2525-26, 2541. So the earlier, 6-foot and 18-foot zones were not attacked *per se* by the Court, only the 35-foot zone was, *see id.* at 2541. Similarly, there may be a more moderate path in the instant case, rather than knocking down all limits.

For example, HB2 says that an abortion doctor must find admitting privileges at a hospital within 30 miles. Tex. Health & Safety Code § 171.0031(a)(1). Instead of voiding this completely, the Court could, say, declare that the 30-mile limit has to be extended to 40 miles, or 50 miles, if the Court finds that such a relaxation of restrictions would probably allow a few more abortion facilities to exist in the places where they would be otherwise shut down. Maybe many of those facilities would have to shut down anyway, but enough would remain so that no woman in Texas would have to drive more than 150 miles (or 200 miles, or 240, as the Court judges) to get to an abortion facility.

Especially with modern computer technology, numbers and data could likely be "crunched" so that a reasonable number of miles might be found, 30, 40, or whatever, which would let some (though probably not all) of the clinics allegedly shut down by HB2 to survive.

As an alternative, if no one wants to crunch too many numbers, a likely-more-relaxed admittance standard than Texas' could be used, such as Tennessee's. *See* Resp'ts' Merits Br. at 2a,

> Tenn. Code Ann. § 39-15-202(j)(1) ("A physician may not perform an abortion unless the physician has admitting privileges at a hospital located: (A) In the county in which the abortion is performed; or (B) In a county adjacent to the county in which the abortion is performed.")[.]

Id. (citation partially omitted) If a Texan physician can have admitting privileges in an adjacent county, *see id.*, that might allow some more clinics to remain open.

And similarly for other pertinent parts of HB2, which could be appropriately relaxed, rather than destroyed, by this Court, a Court which does not have problems with limiting, instead of destroying, free-speech restrictions at abortion clinics. *See McCullen*, *supra* at 35-36; *see also, e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000) (allowing eight-foot non-contact zone near abortion clinics). Seeing that HB2 may save women's lives—both of born and unborn women—, mending it would be wiser than ending it.

X. THE IDEALS OF BALANCE OR RECIPROCITY, IN *ZUBIK*, THIS CASE, AND ELSEWHERE

Mending rather than ending, is one useful form of "balance" And as Amicus said earlier, the instant case forms a "mega-case" of sorts with *Zubik*, so "balancing" the cases is important.

The Court, for all Amicus knows, may be tempted to rule for Petitioners fully in *Zubik*—and for Petitioners fully here. That is, *Zubik* Petitioners would be allowed not only to avoid contraceptives, but also to ignore any externalities they foist on women employees and students, or taxpayers and insurers. And Petitioners here would be allowed to knock down all of Texas' abortion laws at issue, sans severability. Maybe it should be the other way around, though, at least in part.

After all, with the "moderate solution" Amicus suggested in *Zubik*, Petitioners there would never have to suffer a substantial burden. But if Petitioners here get everything they want, there may be many deaths or injuries, either of fetuses or of women denied optimal medical care, that did not have to happen.

One reason Amicus said that *Zubik* Petitioners may have additional responsibilities to fulfill to taxpayers and employees, was to protect those Petitioners, by ensuring no one can say they are being irresponsible.

Conversely, here, not only are abortion providers called to responsibility—of the kind Kermit Gosnell so desperately failed to meet—, but women are called to responsibility as well, given the huge change in their estate since 1973 and 1992. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013), "Responsibilities, as well as rights, enhance the dignity and integrity of the person." *Id.* at 2694 (Kennedy, J.).

Women are not just helpless victims. If they can be Navy SEALs now, they can probably manage a 4-

hour (or longer) drive to an abortion clinic without falling to pieces. Amicus trusts that they are capable of fulfilling that responsibility. (As one Justice is fond of saying, "With power comes responsibility." America's empowered women of today can rise to responsibility as well.)

* * *

"Abortion is violence[.]" Catharine MacKinnon, *Abortion: On Public and Private, in* Toward a Feminist Theory of the State 184, 184 (1989) (quoting Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (1976)). This truth applies not only to the fetus, but to the mother in a sense, whether she is coerced into the abortion, or coerced into sex, or suffers substandard medical care. Texas is trying to provide better medical care to women at abortion clinics, which should help alleviate one form of violence due to abortion.

Our brotherhood and sisterhood with pregnant mothers, and with abortees or potential abortees, is important to recognize. One hopes that some of the "dignity" spoken of *passim* in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), can extend to both the born and the unborn in the instant case.

Just as in his *Zubik* brief, Amicus mentions Lesley Gore's *You Don't Own Me*[12] as a slogan which could apply to both a pregnant mother and her daughter inside her. Amicus hopes the Court will show respect to everyone's value. So many people look to the Court for validation of their dignity, and

---

[12] (Mercury 1963).

Amicus thinks that the unborn and born would appreciate opinions here (and in *Zubik*) that would do so. As per Sister Sledge's *We Are Family*,[13] "Just let me state for the record/We're giving love in a family dose", *id.*, Amicus, in this instant case, looks forward to a serious and Solomonic dose of healing wisdom from the Court.

CONCLUSION

Amicus respectfully asks the Court to uphold the judgment of the court of appeals, and to add any needed improvements; and humbly thanks the Court for its time and consideration.

February 3, 2016 Respectfully submitted,

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

---

[13] (Cotillion 1979); *available at* Pierre Richard, YouTube, Mar. 25, 2010, https://www.youtube.com/watch?v=eBpYgpF1bqQ.